bers. If the respondent is desirous of disputing the validity of these transfers they ought to comply with the statutory procedure set in section 162 of the Companies Act 1965. Since the respondent had failed to do so, in our opinion, the matter was not properly before the learned judge and he ought not to have ruled on it.

It was contended by the learned State Legal Adviser that the appellants had no *locus standi* to bring this action against the respondent inasmuch as the appellants were not parties to the Joint Venture Agreement dated May 2, 1978. For the appellants it was pointed out (correctly in our opinion) that in dealing with this submission the learned judge appeared to have failed to consider the Interpretation provision contained in Article 2 of the Articles of Association of the 1st defendant company where the "Shareholders" have been defined to mean "Ng Chee Cheong, Ng Wing Chong, Ng Yew and Yee Wai Fong. For the purposes of these Articles, the Shareholders include ..... any company or companies wholly-owned by the Shareholders and/or the immediate members of their family or families to whom and/or to which their shares in the Company may hereinafter to be transferred". "Company" means Maran Road Sawmill Sdn. Bhd., the 1st defendant company and "The Agreement" means "The Agreement dated May 2, 1978 made between the shareholders and ASPA" or to give its full name, Amanah Saham Pahang Berhad, a public company limited by shares incorporated in Malaysia and having its registered office at Bangunan LKPP, Jalan Gambut, Kuantan, Pahang. It was pointed out that the appellants, C.C. Ng & Brothers Sdn. Bhd. or CCNB has also been defined in Article 2 to mean "a private investment holding company limited by shares incorporated in Malaysia and having its registered office at Selangor Kwang Tung Association Building, Jalan Pudu, Kuala Lumpur, formed for the purpose of representing the Shareholders collectively".

In our judgment, this is not a proper time to consider these rival submissions when the inherent jurisdiction of the Court is invoked to strike out a writ and/or a statement of claim on the ground that it was an abuse of the process of the Court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution [per Lord Diplock in *Tractors Malaysia Bhd.* v. *Tio Chee Hing*[1]]. In *Lawrance* v. *Norreys*[2] Lord Herschell said words to the same effect that "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". In our opinion, the question posed before the learned judge ought to be decided at the trial.

For the above reasons we allow the appeal and set aside the order of the learned judge in striking out the writ and the statement of claim against the 6th defendant as we are not satisfied that the respondent had made good the various charges against the appellants. The appellants are awarded costs here and below. Deposit to be refunded to the appellants.

Appeal allowed.

Solicitors: *Chung & Huang.*

CHEW HOCK SAN & ORS. v. CONNAUGHT HOUSING DEVELOPMENT SDN. BHD.

[F.C. (Seah, Mohamed Azmi & Syed Barakbah F.JJ.), September 18 & December 18, 1984]
[Federal Court Civil Appeal Nos. 144 & 146 of 1984]

Contract – Agreement for purchase of shophouse – Booking fee – Whether clerk of housing developer has authority to accept bookings – Ostensible authority – No authority to act on behalf of company.

Companies – Person purporting to act on behalf of company – Whether he has ostensible authority.

In this case the respondent was a licenced housing developer and was involved in the construction and development of a housing estate. The official booking for the shophouses had not commenced but a clerk accepted cheques for $5000/– from each of the appellants and issued type written receipts acknowledging the payments. The clerk kept the cheques which were not credited to the respondent's bank account until the date of the trial. The learned trial Judge was satisfied that the respondent had not represented to the appellants that the clerk was authorised to accept bookings on its behalf. He therefore dismissed their claims for specific performance of the purported sale agreements in which they alleged they had paid a booking fee of $5000/– each to the respondent's clerk. The appellants appealed.

Held: dismissing the appeal, this was a case where it would not normally be expected to be within the authority

of the clerk to act as he did in the circumstances and any holding out by the clerk at the material time was done without the knowledge and consent of the respondent. There was no representation that the clerk was authorised to accept bookings on its behalf.

Cases referred to:

(1) *Freeman & Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480, 502-504.
(2) *British Bank of the Middle East* v. *Sun Life Assurance Co. of Canada (U.K.) Ltd.* [1983] 2 Lloyd's Rep. 9.
(3) *Mahony* v. *East Holyford Mining Co.* (1875) L.R. 7 H.L. 869.
(4) *Clay Hill Brick & Tile Co. Ltd* v. *Rawlings* [1938] 4 All E.R. 100.

FEDERAL COURT.

R.R. Sethu (*Abdul Rahman* with him) for appellants in F.C.C.A. 144/84.

R.R. Sethu (*S.Y. Lai* with him) for appellants in F.C.C.A. 146/84.

P. Royan for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah F.J. (delivering the Judgment of the Court): This was an appeal by the six appellants against the decision of the High Court Judge at Kuala Lumpur dismissing their claims against the respondent with costs. The suits were consolidated by Order of Court dated February 26, 1982 and were heard together by the learned Judge.

As the plaintiffs in the Court below, each of the appellants filed a writ for specific performance of a purported sale agreement in which they alleged to have paid a booking fee of $5,000/- each to the respondent's clerk for the purchase of 3½ storey shophouses at the price of $250,000/- each. They also prayed for a court order for the execution of the sale agreement with the respondent to enable them to purchase the house at the said price on the ground that they had been denied the opportunity and the right to execute proper sale and purchase agreements for the property which they had booked earlier when the phase 3 housing project was subsequently opened by the respondent to the public. The learned Judge rightly concluded from the evidence before the Court that the claim for specific performance was founded on the receipts issued by the respondent's clerk (D.W.1) for the payment of the booking fee and on the allegation that D.W.1 at the material time was acting as the agent for the respondent. The respondent in their defence denied that any contract was concluded or could be inferred. They contended further and in the alternative that there was no enforceable contract between the parties until the execution of proper sale and purchase agreements.

In considering the issue whether there was any valid and enforceable contract between the parties, the crucial point that arose before the learned Judge was whether D.W.1 at the material time had authority from the respondent to accept bookings on its behalf from the appellants and whether the respondent had held out that D.W.1 was so authorised. The learned Judge concluded from the evidence and the surrounding facts and circumstances of the case that D.W.1 had no such authority on the ground that the acceptance of the appellants' cheques and the issue of the receipts by D.W.1 were his personal acts for which the respondent could not be held liable. Further, the Judge was satisfied that the respondent had not represented to the appellants that D.W.1 was authorised to accept bookings on its behalf.

The undisputed facts were that the respondent, a licensed housing developer, was at the material time involved in the construction and development of Taman Connaught at 5½ miles, Jalan Cheras, Kuala Lumpur. The development was in phases. Having completed phase 2, the respondent was contemplating to commence phase 3 which consisted, *inter alia*, of 66 shophouses to be constructed. The proposed price of each was $250,000/-. The appellants came to know about it some time in July 1979 and on learning that one Mr. Liew (D.W.1) who was working in the respondent's office might be able to assist and arrange for the booking of the shophouses, the appellants approached D.W.1 in the respondent's office on separate occasions. They were told that the official booking had not yet commenced. However, the appellants issued cheques for $5,000/- each payable in the name of the respondent and handed them to D.W.1 who in turn issued typewritten receipts acknowledging the payments. D.W.1 kept the cheques which were not credited into the respondent's bank account until the day of the trial. The learned Judge accepted D.W.1 as a truthful witness whose evidence was substantially corroborated by that of the respondent's manager D.W.2. He also concluded that the testimony of Lee Geok Tian (P.W.7), an independent witness who also booked for a shop lot about the same time as the appellants, helped to explain the true position. He has taken proper advantage of having seen and heard these witnesses and his conclusion on the facts are well supported by evidence. From the

evidence as accepted by the learned Judge, the following facts came to light:–

(1) On or about July 13, 1979, booking for phase 3 had not been officially opened. Acceptance of booking commenced on October 18, 1979, *i.e.* about three months later, when booking was officially opened.

(2) The appellants at the material time knew booking had not yet been opened as they had been so informed by D.W.1. The issue of temporary receipts and the keeping of the appellants' cheques by D.W.1 were done with a view to waiting for the official opening to enable the appellants to make official bookings with the respondent after D.W.1 had informed them by phone.

(3) D.W.1 also showed them the site plan on the wall, allowed them to make a choice of the lot to be earmarked for them and quoted the price of $250,000/–.

(4) D.W. 1 claimed he was doing this on a personal basis as a favour to the appellants who were not strangers to him and in the expectation of obtaining some personal benefit.

(5) The respondent's manager (D.W.2) confirmed that D.W.1 had no authority to accept bookings for the phase 3 project in July 1979. According to him, D.W.1 was a general clerk assisting in the administration of the office and checking of correspondence relating to progress payments. It was also his duty to request purchasers to come and make payments to the account or booking clerks. There were two booking clerks whose duties were to accept bookings. In the circumstances, it would not be difficult for D.W.1 to have advised the appellants to go and see them for the purpose of bookings.

(6) The real position was explained by D.W.2. The advertising permit for phase 3 which enabled the respondent to open the phase for booking to the public was approved by the Ministry of Housing on October 8, 1979. Prior to obtaining the advertising permit, no developer could accept any booking. The price of the shophouses had also to be approved by the Ministry. The approved price for a 3½ storey shophouse for phase 3 was $299,950/–. The respondent could not sell for more than that price. It was only after the approval that the price was fixed by the respondent at $295,000/– The price of $250,000/– as recorded earlier by D.W.1 in the receipts could not in the circumstances be the official price.

(7) It would appear that on October 18, 1979 when booking was officially opened, D.W.1 informed the appellants by phone to come and make their bookings. They were not happy over the price of $295,000/– fixed for one shophouse. They came to see D.W.1, expressed their annoyance and were later taken to see D.W.2 in the latter's office. Subsequently, the respondent was prepared to reduce the price by $10,000/–. The appellants were still dissatisfied and stuck to the price of $250,000/– as given by D.W.1 earlier. It was clear therefore that in spite of the appellants' refusal to make purchase bookings because of what had transpired earlier between them and D.W.1, the respondent was still prepared to offer them at the reduced price of $285,000/–. The appellants refused. They then lodged private caveats against the land to prevent the respondent from dealing with the said land.

(8) The matter was in fact inquired into by an official of the Ministry of Housing after receipt of a complaint from the appellants and an inquiry was held in the Ministry prior to the trial.

(9) P.W.7 was one of the purchasers who agreed with the respondent's offer of the new price and took advantage of the 10% discount by booking for a house at $285,000/–, although he had also paid a deposit of $5,000/– through one Mrs. Chew, some time in April 1979. This evidence confirmed that at the material time booking for phase 3 had not yet commenced and the price of $250,000/– fixed then was unofficial. Apparently, it was still premature for bookings to be accepted at that time. When booking was subsequently opened, he agreed to accept the return of the $5,000/– cheque and thereafter paid a 10% deposit, *i.e.* $28,500/– on the new price for which he was issued an official receipt by the respondent. He also executed a sale and purchase agreement with the respondent.

Having regard to the facts and circumstances of this case, we agree with the learned Judge that the five receipts issued by D.W.1 to the appellants were not the official receipts of the respondent nor were they issued by the respondent because they were typewritten copies which bore no letterheads of the respondent. Moreover, such practice was con-

trary to the normal course of business of the respondent as a licensed housing developer.

The legal position of a company or a corporation is that being a fictitious person it can only do any act which includes making a representation through its agents or servants. The capacity of such a company is limited by its memorandum and articles of association. In other words, it can act within the ambit of the powers or provisions expressly provided in the memorandum and articles of association. In the ordinary course of business, a third party when entering into a contract with a company normally relies on the authority of an agent of the company.

Now, the difference between an actual and an apparent or ostensible authority and the principles applicable thereto are adequately explained by Diplock L.J. in *Freeman & Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd.*[1] from page 502 to page 504 as follows:

"It is necessary at the outset to distinguish between an "actual" authority of an agent on the one hand, and an "apparent" or "ostensible" authority on the other. Actual authority and apparent authority are quite independent of one another. Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different. As I shall endeavour to show, it is upon the apparent authority of the agent that the contractor normally relies in the ordinary course of business when entering into contracts.

An "actual" authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the "actual" authority, it does create contractual rights and liabilities between the principal and the contractor . . . .

An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority."

We are satisfied that in the present appeal, the question as to actual authority did not arise. What was in issue before the learned Judge was whether there was apparent or ostensible authority upon the representation of the respondent as the principal or upon the representation of D.W.1 as the agent. In this respect, "the representation" said Lord Diplock "which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into."

It was submitted that D.W.1 had the implied authority to accept purchase bookings at the material time on behalf of the respondent on the ground that he signed as manager in the correspondence. We noted that in one correspondence (page 163 of Civil Appeal No. 146 of 1984), D.W.1 signed on behalf of the manager of the respondent. The letter, however, relates to a developer's notice requesting for progress payment from a purchaser and submitting an architect's certificate showing the completion of foundation work. According to the date, June 2, 1978, the letter could well refer to phase 2 and was probably within the duties of D.W.1 as a general clerk to have done so. There is other similar correspondence signed by D.W.1 on behalf of the respondent also referring to phase 2 which again, in our view, falls within the duties of D.W.1 as a general clerk. The only document which relates to the acceptance of a purchase booking fee of $1,000/- signed by D.W.1 for and on behalf of the respondent on the company's booking form is Ex. D24. That was done on October 22, 1979, *i.e.*

about four days after booking had been opened by the respondent. (See page 282 of Civil Appeal No. 144 of 1984).

It was also submitted that D.W.1 could have been authorised to accept bookings by the booking clerks, as admitted by D.W.2, and in the absence of evidence that the booking clerks were not authorised to delegate. In this regard, the accepted principle is that the "apparent" authority must be made by someone who had the "actual" authority to make such representation as empowered by the memorandum and articles of association of the company. This is normally conferred upon the Board of Directors or those having the powers of management to delegate authority to some other person. [*Freeman's case (supra)* and *British Bank of the Middle East* v. *Sun Life Assurance Co. of Canada (U.K.) Ltd.*[2]]. If at all the two clerks had delegated their work to D.W.1, it is apparent that they have no authority to do so in the absence of evidence that they had actual authority to delegate such power to D.W.1. Similarly, the conduct of the respondent's receptionist in directing the appellants to see D.W.1 as the person to receive bookings, if such allegations are true, cannot amount to a representation by the respondent in the circumstances.

It can be seen that in the relevant cases stated below, not only the articles of association confer power on the directors to delegate but the person purporting to act for the company was acting within the scope of what would normally be expected to be within the authority of one of his position. (Per William L.J. in *Freeman's case* page 493). It is also well established that all persons dealing with a company are affected with notice of its memorandum and articles of association which are public documents open to inspection by all. (*Mahony* v. *East Holyford Mining Co.*[3]).

In *Clay Hill Brick & Tile Co. Ltd.* v. *Rawlings*[4], a company was held bound by the act of its chairman who acted as managing director though never appointed as such, in receiving cheques from a customer in payment for goods supplied by the company. Similarly, in *Freeman's case*, the act of K, one of the directors of the company in appointing the plaintiff, a firm of architects, to apply for planning permission to develop the estate belonging to the company was within the authority of a managing director of the company; although no such managing director was appointed, the articles of association contained such power to appoint him as such. In contrast is the case of *British Bank of the Middle East (supra)*. There letters of undertaking issued by a branch manager, a junior employee of the respondent insurance company to the Bank were held not to be binding on the insurance company on the ground, *inter alia*, that the branch manager had no authority, express or implied, to execute the undertakings on behalf of the company. It was not a case of the company holding out the branch manager as having its authority, express or implied, to answer the letter in the way he did but rather the case where he, without the knowledge or permission of the insurance company, held himself out as having such authority. In the case before us, the person alleged to be purporting to act for the respondent was a general clerk and according to the evidence of D.W.2 the manager, as accepted by the learned Judge, D.W.1 had no authority to accept booking fees nor to issue receipts on behalf of the respondent. D.W.1's service was terminated by the respondent sometime in September 1980.

In our considered judgment, this was a case where it would not normally be expected to be within the authority of D.W.1 to act as he did in the circumstances, and any holding out by D.W.1 at the material time was done without the knowledge and consent of the respondent. We agree with the learned Judge that there was no representation by the respondent that D.W.1 was authorised to accept bookings on its behalf. The appeal is hereby dismissed with costs and the judgment of the learned Judge is confirmed.

Deposit to the respondent to account for costs.

Appeal dismissed.

Solicitors: *Adnan, Sundra & Low; K.P. Woon & Co; Shook Lin & Bok.*